IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.69 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NIRMAN TEXTILE MILLS PVT. LTD.

Versus

A.C.I.T.

Appearance:

MRS SWATI SOPARKAR for Appellant No. 1

MR MANISH R BHATT for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 10/01/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

Leave to amend.

2. This appeal arises from the order of the Tribunal dated 29-08-2003 in ITA No.2750/Ahd/96 for Assessment

Year 1991-92 filed by the Revenue before the Tribunal.

3. Heard Mr.S.N.Soparkar, learned Senior Advocate for the appellant, and Mr.M.R.Bhatt, learned Senior Standing Counsel for the Revenue.

ADMIT.

4. The following substantial question of law arises for determination :

"Whether on the facts and in the circumstances of the case, the order of the Tribunal can be said to have been made in accordance with law and is not perverse when the decision reverses the order of the C.I.T. (Appeals) without giving any reasons? "

5. Notice was issued on 06-12-2004 in light of the ratio of decisions of this Court reported in - (i) 251 ITR 541; (ii) 257 ITR 297; and (iii) 256 ITR 460. Thereafter on 30-12-2004 the appellant was directed to file the paper book which was submitted before the Tribunal. The matter is taken up for hearing and final disposal in light of the following facts and the reasons which follow hereinafter.

6. The assessee is a Private Limited Company. For Assessment Year 1991-92 the relevant previous year is Financial Year ended on 31-03-1991. Return of income filed by the assessee on 31-12-1991 declaring total income of Rs.1,58,040/- was processed under Section 143(1)(a) of the Income-tax Act, 1961 (the Act). It is an admitted fact that the return was duly accompanied by audited accounts, tax audit report in statutory form and other relevant details. Subsequently the assessment was framed under Section 143(3) of the Act vide order dated 25-03-1994. In the said assessment the Assessing Officer disallowed a sum of Rs.11,66,465/- towards unaccounted purchase of yarn.

7. According to the Assessing Officer during survey under Section 133A of the Act carried out at the factory premises of the assessee - Company on 08-02-1991, seven octroi bills/receipts were found evidencing purchases of raw material. After the statement of one Shri Narendrabhai P. Patel, a director of the assessee Company, was recorded at the time of survey, a disclosure was made by the said person and one of the items of the disclosure was a sum of Rs.11,66,465/- being the amount of seven bills of purchases towards which the aforesaid seven octroi receipts were found. While making the

addition on the basis of the aforesaid statement the Assessing Officer disbelieved the explanation tendered by the assessee Company vide letter dated 15-03-1991 whereunder the aforesaid admission/disclosure made by the director was retracted.

8. The assessee carried the matter in appeal before the C.I.T. (Appeals) who, for the reasons stated in his order dated 01-02-1996, granted partial relief to the extent of sum of Rs.11,45,368/- in relation to six octroi receipts while confirming the addition to the extent of Rs.34,902/- in relation to the seventh octroi receipt. The C.I.T. (Appeals) while framing the order has extensively referred to the evidence produced before him by the assessee in the form of two paper books.

9. Both the assessee and the Revenue carried the matter in appeal before the Tribunal : the assessee challenging the retention of addition of Rs.34,902/-, and the Revenue challenging the deletion of addition of Rs.11,45,368/-. The Tribunal, for the reasons stated in its order of 29-08-2003, allowed the appeal of the Revenue, reversing the order of C.I.T. (Appeals), and restored the addition of Rs.11,45,368/-; it also dismissed the assessee's appeal in relation to addition of Rs.34,902/-.

10. Assailing the aforesaid order of the Tribunal the learned counsel for the appellant submitted that the Tribunal has failed to exercise jurisdiction in accordance with law while reversing the order of C.I.T. (Appeals) in as much as the Tribunal has not only not discussed the evidence which has weighed with the first appellate authority, but has also failed to assign any independent reasons for restoring the addition made by the Assessing Officer. He placed reliance on the following decisions of the Apex Court as well as the decisions of this Court :

(i) Omar Salay Mohamed Sait Vs. Commissioner of Income-Tax, Madras, [1959] 37 ITR 151);

(ii) Lalchand Bhagat Ambica Ram Vs. Commissioner of Income-tax, Bihar and Orissa, [1959] 37 ITR 288;

(iii) Mercury Metals (P.) Ltd. Vs. Assistant Commissioner of Income-tax, [2002] 257 ITR 297 (Guj.); AND

(iv) Rameshchandra M. Luthra Vs. Assistant Commissioner of Income-tax, [2002] 257 ITR 460 (Guj.);

to submit that it was necessary for the Tribunal to discuss the evidence which was on record for arriving at the decision and the Tribunal having failed to do so, the order was vitiated in law and was thus a perverse order. It was, therefore, urged that the matter be restored to the file of the Tribunal with a direction to the Tribunal to decide the issue afresh after considering the evidence which was available on record.

11. Mr.Bhatt, for the respondent - Revenue, submitted that the Tribunal had taken into consideration the fact that the retraction was made after 38 days of the statement recorded during course of search and that the explanation tendered before the C.I.T. (Appeals) had not been furnished before the Assessing Officer. It was also submitted that the Tribunal had not accepted the explanation of the assessee that only the director who was out of station was having the knowledge about the seven octroi receipts and in such circumstances, the Tribunal having proceeded on the basis of human probabilities, it could not be stated that it had committed any error in passing the order in the manner it did. He, therefore, submitted that no interference is called for in the facts and in the circumstances of the case.

12. When the survey took place on 08-02-1991 seven octroi bills/receipts were found from the factory premises of the assessee - Company. As the said receipts denoted purchases of goods, the director present at the time of survey, Shri Narendrabhai P. Patel was called upon to tender his explanation and reconcile the said purchases reflected by the octroi bills as against the purchases recorded in the books of account. It appears that in the statement recorded the said director accepted the fact that the purchase bills had not been entered in the books of account and hence the purchases were unaccounted. Accordingly, he disclosed a sum of Rs.11,66,465/- being the amount of the said bills of purchases. Thereafter on 15-03-1991 the assessee Company filed a letter tendering its explanation in relation to the said item and retracted the disclosure made by the director. In the retraction letter the director stated that at the relevant time he was not able to lay his hands on the relevant documents/materials and, therefore, he was constrained to make the disclosure; that on scrutiny of the relevant documents it was found that all

the entries of the purchases reflected by the octroi receipts were debited in the books of account except for the difference in quantity mentioned in one of the bills. The Assessing Officer having rejected this explanation the assessee carried the matter in appeal and reiterated its explanation. However, the assessee to buttress its submission, filed two paper books before the C.I.T. (Appeals). It is an admitted fact that copies of the paper books were forwarded to the Assessing Officer whose comments were received by the C.I.T. (Appeals) vide letter No.ACIT/Co.Cir.7(1)/Appeal/95-96 dated 06-10-1995.

13. The C.I.T. (Appeals) has taken into consideration the explanation of the appellant that Shri Prahladbhai P. Patel, the Chairman and Managing Director of the assessee - Company, was looking after the business and that the other director present at the time of survey, Shri Narendra P. Patel was not fully conversant with the facts pertaining to seven octroi receipts and in the circumstances, was not in position to offer any explanation and hence, the disclosure. The C.I.T. (Appeals) has further appreciated the evidence in 3 sets: one pertaining to four octroi bills; second pertaining to two octroi bills; and third pertaining to one octroi bill. He has accepted the explanation in relation to the first and second set while rejecting the explanation tendered by the assessee in relation to the third set. Accordingly, the C.I.T. (Appeals) deleted the addition to the tune of Rs.8,79,405/= pertaining to first set and Rs.2,65,963/= pertaining to second set, while addition to the extent of Rs.34,902/= has been confirmed corresponding to the third set.

14. The Tribunal in the impugned order has held that (i) the C.I.T.(Appeals) has deleted the addition mainly on the ground that the Assessing Officer is not able to understand facts in proper perspective; (ii) the explanation tendered before C.I.T. (Appeals) was not furnished before the Assessing Officer; (iii) the assessee took 38 days in retracting the statement recorded during course of survey and that the statement was voluntarily made without any threat or coercion; (iv) search is generally conducted in presence of two independent witnesses and the assessee had failed to obtain any statement from any witness that there was any illegality/irregularity in the search or recording of statement of Shri Narendrabhai Patel; (v) that it was unbelievable that facts pertaining to seven octroi bills were in the knowledge of the director who was out of station. Thus, the Tribunal came to the conclusion that on the basis of admission made by Shri Narendrabhai

Patel, the addition was rightly made by the Assessing Officer but wrongly deleted by the C.I.T. (Appeals).

15. The legal position is well-established and bears no repetition. It was necessary for the Tribunal to bear in mind that the assessment order had merged with the order of the C.I.T. (Appeals) and in case the Tribunal was inclined to reverse the order of C.I.T. (Appeals) it was necessary for the Tribunal to record, howsoever briefly, the reasons for the same. The impugned order of the Tribunal nowhere reflects as to what were the facts and evidence placed before the C.I.T. (Appeals) by the assessee and on the basis of which the C.I.T. (Appeals) accepted the explanation of the assessee. In the view that the Court is inclined to take it is not necessary to enter into discussion on merits of the issue involved nor the veracity or the weightage to be assigned to the evidence available on record. Suffice it to state that as against the statement regarding admission at the time of survey, the assessee had placed on record its letter of retraction and evidences in support of such retraction. The least that was expected of the Tribunal was to discuss that evidence with reasons as to why the said retraction coupled with the evidence was not acceptable, especially when the same had been accepted by the C.I.T. (Appeals). The Tribunal states that the explanation was not furnished before the Assessing Officer and was placed on record before the C.I.T. (Appeals) for the first time overlooking the fact that the C.I.T. (Appeals) in Paragraph No.2.1 of his order has categorically recorded that the said evidence in the form of paper books was forwarded to the Assessing Officer and the Assessing Officer had after perusing the same offered his comments vide letter dated 06-10-1995. This is just an instance of the modality, i.e. the cursoriness with which the Tribunal has dealt with the issue.

16. In 1959 the Apex Court had observed that if the Tribunal arrives at its own conclusion of fact after due consideration of evidence before it the Court will not interfere, but for this purpose it was necessary that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the points for determination before it, and what was the evidence pro and contra in regard to each of the issues and what were the findings reached on the evidence on record before it. (Omar Salay Mohamed Sait Vs. Commissioner of Income-Tax, Madras, [1959] 37 ITR 151). This position has been reiterated once again in 2002 by

this Court after referring to the aforesaid judgment in the two decisions rendered in case of Mercury Metals (P.) Ltd. Vs. Assistant Commissioner of Income-Tax, [2002] 257 ITR 297 and Rameshchandra M. Luthra Vs. Assistant Commissioner of Income-Tax, [2002] 257 ITR 460. The Tribunal has passed the order on 29-08-2003 and yet seems to be blissfully unaware of the legal position.

17. In light of the aforesaid fact situation, the impugned order of the Tribunal is quashed and set aside to the extent of addition of Rs.11,66,465/- and the matter is restored to the file of the Tribunal for the purposes of adjudication afresh in light of the well established legal principles enunciated by the Apex Court and this Court.

18. Accordingly, the appeal is allowed to the aforesaid extent. The question is answered in light of what is stated hereinbefore. The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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